BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICTORINA ALMAREZ	)	
A.K.A VICTORINA ALMARAZ	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 179,646 & 179,647
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	
	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed the February 20, 1996 Award entered by Administrative Law Judge Jon L. Frobish.

APPEARANCES

Claimant appeared by his attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas. The Workers Compensation Fund (Fund) appeared by its attorney, Randall D. Grisell of Garden City, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, the Appeals Board considered the deposition of Charles Paulson taken May 3, 1995 and the second deposition of C. Reiff Brown, M.D., taken August 7, 1995. These two depositions were apparently considered by the Administrative Law Judge as they are listed in the Award for purposes of assessment of costs, but were omitted from the recitation of the record. Also, the first deposition of C. Reiff Brown, M.D.,

was taken May 1, 1995 as opposed to April 5, 1995 which is the date listed in the Award, and the deposition of Victorina Almarez was taken June 7, 1995, as opposed to December 9, 1994.

The Appeals Board notes that there is a correction sheet attached to the transcript of the June 7, 1995 deposition of claimant which states that the spelling of her surname should be corrected to the "Almaraz" rather than "Almarez." However, all of the pleadings in this case, as well as counsel's submission letters and briefs to the Board, continue to use the spelling which is reflected on the Award, to wit: Almarez. Accordingly, the Appeals Board will use the "Almarez" spelling as well.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a 10.5 percent whole body functional impairment. Claimant contends she has proven entitlement to a work disability in excess of the functional rating. The nature and extent of claimant's disability is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the arguments and briefs the parties, the Appeals Board finds that the Award entered by the Administrative Law Judge should be modified to a work disability of 30.5 percent.

This case involved two docketed claims. In Docket No. 179,646 claimant alleged injury to her right upper extremity and shoulder by accident on September 4, 1992. In Docket No. 179,647 claimant alleged injury to her right upper extremity and shoulder by accident on approximately January 1993. A regular hearing was held in this matter on March 23, 1995. At that time the parties agreed to consolidate the two claims under the first accident date of September 4, 1992. It was also agreed that there was one functional impairment of 10.5 percent to the body as a whole for both docketed claims.

Claimant testified that on September 4, 1992 she slipped in water and grease on the floor at work, injuring her right shoulder and right hand. Thereafter, in January 1993, claimant again injured her right shoulder from repetitive use. She described having to pull three or four packages at a time, each package weighing about 16 pounds. She complained to her supervisor and was sent to Roger C. Trotter, M.D., by the company nurse. Eventually, claimant was referred to orthopedic surgeon C. Reiff Brown, M.D., for treatment. At first, Dr. Brown could not treat claimant with medication because she was pregnant. After her pregnancy, Dr. Brown's treatment included injections to claimant's shoulder. Dr. Brown released claimant on April 5, 1994 with the following permanent restrictions:

> "She should permanently avoid repeated use of the right hand above shoulder level and use of the right hand at waist level that would require frequent movement of the hand away from the body of more than 18 inches. She should avoid use of the hook or knife in the right hand and repeated flexion and extension of the wrist and firm grasp of more than 10# on a repeated basis. She will return here on an as needed basis." (May 1, 1995 Brown depo., Ex. 1, at 2).

During part of the time claimant was treating with Dr. Brown, claimant continued working. Her job was on the belt throwing pieces of fat and meat. She then was on a medical leave of absence for a pregnancy. After receiving permanent restrictions to the right arm from Dr. Brown and returning from her pregnancy leave, claimant was given a light duty job of marking ribs. This job was to be temporary until a tour of the plant could be completed. She performed this job for two days, using both hands, instead of one hand as she was instructed. Even so, claimant was having difficulty keeping up. Claimant testified that she was told by her trainer that if she could not keep up that she would be terminated. Claimant complained to Dr. Brown that she was having difficulty keeping up with her work and was in jeopardy of losing her job. According to claimant, Dr. Brown told her that she had a choice of losing her job or loosing the use of her hand and that Dr. Brown recommended claimant try to do the job more slowly.

Claimant viewed the videotape introduced by respondent as Exhibit No. 3 to the regular hearing, which purported to depict the rib marking job she performed. The job claimant was given to do and which is depicted on the videotape is known as marking ribs. That job requires the worker to take a piece of metal, which is the marker, dip it in ink and put it on the side of beef at specific locations. These marks indicate where the meat is to be cut. According to claimant, her supervisor told her that they (respondent) knew the rib marking job was not within her restrictions but that she was to perform it until she was given a tour of the plant to find a job within her restrictions. Claimant disagreed the tape accurately depicted the work she was required to do because the worker on the tape was going too slow and was using a hook, which claimant did not use. Claimant testified that when she was performing the rib marking job the pieces were going by more quickly than what was depicted on the videotape. Also, the worker on the videotape was using a hook with one hand to grab hold of and position the meat and marking with the other hand. Claimant was instructed to do the job without using her restricted right upper extremity. Claimant testified that she would have to stretch out with her arms almost extended straight forward about mid-chest high and grab a piece of meat with her right arm and put a mark on it with her left. Claimant testified that the rib marking job exceeded Dr. Brown's restrictions because she could not perform the job with one hand and it required frequent use of her right hand more than 18 inches away from her body. She also disagreed that the rib marker job did not violate Dr. Brown's restrictions from grasping of more than ten pounds with the right hand because, although the job did not require lifting, it required her to move the hanging sides of beef into position for marking.

Claimant's trainer told her that she needed to do the job with her left arm only. Claimant testified she attempted to the job with only one arm but it was not possible to keep up. According to claimant, she was told if she did not do the job with one arm she would be terminated and that if she could not keep up with the job she would be terminated. In fact, claimant was terminated by respondent on April 27, 1994. The supervisor's comments on the Personnel Action Record, introduced as claimant's Exhibit No. 2 at the regular hearing, states:

> "Victorina was instructed to mark ribs on the main chain. This job is one that we use for people with restrictions. She refuses to do the job. At this point she is being terminated."

Claimant testified that she refused to sign the Personnel Action Record because she disagreed that she refused to do the job. Rather, according to claimant, she was unable to do the job. Likewise, she did not quit.

Claimant testified at the March 23, 1995 regular hearing that her shoulder continues to hurt a great deal. The pain is worse with activity but never completely goes away. It keeps her awake at night and she can sleep only on her left side.

Claimant testified that she has applied for other work but has not been able to find any since being terminated by respondent. She does not know of any of job that she can do which would pay her a wage comparable to the wage she was earning at Excel.

On cross-examination claimant admitted that she was no longer looking for work because she had applied at all of the places she knew of and was waiting to be notified concerning her applications. At the March 23, 1995 regular hearing claimant testified that she had last applied for work in October 1994. She had not seen a doctor for her shoulder since being released by Dr. Brown in April 1994.

The record contains the testimony of Mr. Charles Paulson, Assistant Fabrication Manager, at Excel. At one time he was claimant's supervisor in his former capacity of superintendent over fabrication. He described the job claimant was doing after her return to work following her pregnancy leave and after she received permanent restrictions from Dr. Brown as working the breakdown line marking ribs. He viewed the videotape and testified that he considered it to be an accurate depiction of the job performed by claimant. Mr. Paulson was the representative of respondent that terminated claimant. He testified that he considered the rib marking job to be within claimant's restrictions and that claimant was terminated because she refused to do that job. He agreed that claimant stated that she could not do the job within her restrictions. It was Mr. Paulson who completed the document entitled "Personnel Action Record." The union steward was also present at the time claimant was terminated and her initials appear on the Personnel Action Record.

Mr. Paulson became involved in claimant's situation because the acting general foreman, at the time, Mickey McVaugh, told him that claimant refused to do her job. Mr. McVaugh and claimant's immediate supervisor approached Mr. Paulson on April 24 and advised him that claimant refused to do her job. They considered the job to be within claimant's restrictions because the rib marker job can be performed with one hand. Mr. Paulson also testified the job could be performed without violating the claimant's reaching restriction because there are stands available for the workers to use. If claimant was having problem staying within her reaching restriction, she could have been accommodated with any size stands had she requested. Claimant was instructed to use only her left hand to do the job. Mr. Paulson reviewed the videotape and testified that the speed of the chain as depicted on the videotape was accurate on average but that chain does not go the same speed everyday. Some days it runs faster and some days slower. The fastest that Mr. Paulson can recall the going was when they ran 370 head an hour for two hours one day. That was very unusual. On an average they run from 335 to 340 head an hour. The meat that travels on the chain is a side. It takes two sides to make one head so 335 head represents 670 sides. The slowest he can recall is about 200 head an hour. According to Mr. Paulson, the rib that needs to be marked varies in height depending on the size of the cow, but the cows are sorted by weight so generally all of the marking will be approximately at the same height on any given a day.

A coworker, Enrique Goytia, also reviewed the videotape of the rib marking job. He testified that the videotape was an accurate portrayal of the job. He noted that the videotape depicts the worker with a hook in her left hand and a marker in her right. The ink tray is attached to the stand and to the right and behind the worker. The marker is re-inked every third or fourth side of beef. The hook is used to turn the side to get it into position and also to hold it steady while marking it. According to Mr. Goytia, it would be impossible to mark the carcass without adjusting and holding the carcass. This would be difficult to accomplish without using the hook. About half of the carcass would require reaching more than 18 inches from a persons body to do the job. In the opinion of Mr. Goytia it is not possible to do this job using only one arm. This is because the carcasses do not come down the row in the same position. Also, sometimes there are pieces of meat that must be moved out of the way in order to mark the proper location on the carcass. He has never seen anyone perform this job without using a hook in one hand and a marker in the other, so he does not consider it possible to do this job without using both hands and extending one's hand beyond 18 inches from his or her body. The carcasses are in different positions and therefore the worker must reach different lengths for each. The side of beef weighs from 550 to 595 pounds but if the chuck is not part of the carcass, it would weigh 27 to 35 percent less. Mr. Goytia stated it would not be possible to adjust the carcasses with a 10-pound lifting or gripping limitation. Although he considered the videotape to be generally accurate, Mr. Goytia agreed that the height of the carcasses do vary from what is depicted on the tape as well as the chain speed or the speed at which the carcasses move by the worker. He believed the speed is usually faster than what is depicted on the videotape. The way the rib marking job was originally designed, the worker would be on the floor walking around the carcass. Thus, it was not

necessary to move the carcass in order to mark it. Now the worker is standing on an elevated stand, such as the way claimant performed the job, so it became necessary for the worker to move the carcass in order to properly mark it.

C. Reiff Brown, M.D., a board-certified orthopedic surgeon, treated the claimant for a period of time, seeing her on five separate occasions. On April 5, 1994, he determined claimant had reached maximum medical improvement and he released her from his care. His diagnoses were tendonitis involving the right shoulder and arm and myofacial pain syndrome in her upper trapezius and scapular musculature. He recommended she limit her activity. Possible future treatment would likely consist of trigger point injections and anti-inflammatory medication. He gave her the permanent restrictions as quoted above. She was instructed to return on an as-needed basis.

Dr. Brown reviewed the videotape of the rib marking job and opined that the work activity was within the restrictions that he set for claimant. Dr. Brown gave two depositions in this case. In his May 1, 1995 deposition, Dr. Brown testified that he believed claimant could work within the medium category defined as lifting 50 pounds occasionally and 25 pounds frequently. He pointed out the only lifting restriction pertained to the use of her hands above shoulder level. He did not restrict lifting below the shoulder because the shoulders would not be involved. He did not consider the gripping restriction to be a factor unless using a hand tool such as a hook or knife. On cross-examination Dr. Brown agreed that if the rib marking job required the claimant to frequently extend her hand more than 18 inches from her body then that would be outside his restrictions. At the second deposition taken August 7, 1995, Dr. Brown attempted to clarify what he meant by his restriction limiting claimant's work to reaching not more than 18 inches from her body. However, Dr. Brown also stated that in his review of the videotape it did not appear that the worker was extending her arm more than 18 inches from her body. Of course, depending on the height of the worker and the placement of the stand, the amount of reaching would vary. Furthermore, Dr. Brown conceded that depending on the speed that the carcasses were moving, it could be difficult for the claimant to perform that job with just one arm.

Taking into consideration that claimant was required to handle a side of beef approximately every six seconds, he said "it would depend on how fast that person could turn that carcass to a position where it could be marked; and I don't know, that -- six seconds would be pretty fast to do it." (Aug. 7, 1995, Brown depo. at 15.) After again reviewing the videotape Dr. Brown added "I really think it would be pretty hard for her to keep up with one [hand]." (Aug. 7, 1995, Brown depo. at 17.) However, Dr. Brown added that he did not understand why claimant could not use both hands. Dr. Brown said, "I can't see why she couldn't easily mark with her left hand and rotate the cow with her right hand with a hook in it. She could have been easily reaching down low with that hook to rotate that beef around to a position where she could mark it with her left hand. I think she could do that job with her -- using her -- (Interrupted)." (Aug. 7, 1995, Brown depo. at 18.) When asked to assume that claimant was instructed to perform the job with only her left hand, Dr. Brown agreed it would be a difficult task.

Claimant was examined on May 23, 1994 by board certified orthopedic surgeon, Edward J. Prostic, M.D., at the request of her attorney. With regard to her right upper extremity, Dr. Prostic found claimant to have injury to the intercarpal ligaments with some instability of the wrist, chronic rotator tendonitis in the shoulder, stenosing tenosynovitis of tendon sheaths of her right hand and rotator cuff tendonitis of the left shoulder. He recommended claimant avoid repetitious use of her hand or significant use of her hands at and above shoulder height. Dr. Prostic also agreed that the restrictions recommended by Dr. Brown were reasonable restrictions for claimant to follow. Dr. Prostic was not asked to view the videotape of the rib-marking job.

Because hers is a "non-scheduled" injury, the determination of permanent partial disability compensation is controlled by K.S.A. 1992 Supp. 44-510e(a) which provides in pertinent part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

The parties have stipulated that claimant's functional impairment is 10.5 percent to the body as a whole. Following her release to return to work, claimant performed an accommodated light duty job for less than two days. Claimant was then terminated because of her refusal or inability to perform the job. The Appeals Board does not consider the time spent in the light duty job to be sufficient to give rise to the presumption of no-work disability contained in the statute. However, the fact that the respondent offered claimant an accommodated job would be sufficient to evoke the principles in the case of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), if that accommodated job was found to be within claimant's restrictions and claimant refused to put forth a good faith effort to perform the job offered. The claimant in Foulk refused to even attempt the accommodated job offered by respondent. That is not the situation here. Instead, the issue is whether or not claimant was able to perform the job offered, or, stated another way, whether claimant put forth a good-faith attempt to perform the light duty work. *See* Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995). This presents a very close question. There is obviously testimony going both ways on this issue. However, taking the record as a whole, the Appeals Board finds that claimant has established sufficient doubt as to her ability to perform the job so as to persuade the Appeals Board that the public policy considerations announced in Foulk are not applicable to the situation presented in the case. Furthermore, claimant has shown

that the rib marker job was not one which could be performed one handed. Respondent admits she was instructed not to use her dominant right hand. In her mind, claimant was faced with the choice of either violating her restrictions and the instructions of her supervisor by using both hands, or not being able to keep up with the work. Either way she faced termination.

Only one vocational expert testified concerning claimant's work disability. Michael J. Dreiling interviewed claimant at the request of her attorney. He prepared a vocational assessment to determine the impact claimant's on-the-job injury had on her vocational capacities. Based upon the medical restrictions of both Dr. Brown and Dr. Prostic, Mr. Dreiling concluded that claimant lost the capacity to perform a wide range of work. Mr. Dreiling's June 18, 1994 report, which is Exhibit 4 to his deposition testimony, states in pertinent part as follows:

> "The restrictions would essentially limit her vocationally from heavy and medium work as well as work that requires use of the wrists and reaching activities beyond a certain level. When considering solely the elimination of heavy and medium work, she will experience a loss of 56% in terms of access to the open labor market. Further labor market information reports that 62% of the jobs for someone with a limited educational background do require average manual capabilities which involves the use of the hands and wrist in performing the job. Additionally, 83% of all the jobs for somebody with a limited educational background do require frequent reaching activities, which would further impact on her loss of access to the open labor market. What this information indicates is that for individuals with limited educational backgrounds and few skills, they rely primarily on their upper extremities in order to perform job tasks.
>
> "Based upon her restrictions, she will have a loss of 56% in terms of lifting and as high as 83% when taking into consideration the problems with reaching activities. She has been terminated from her employment and has not been able to find other work. Based upon the medical restrictions, I do believe that she will have problems finding other employment, but I do believe that she will have the capacity to perform at least entry-level work up to $5.00 per hour, which when compared to a pre-injury wage of $8.24, would indicate a 40% loss in terms of earning comparable salary." (Dreiling depo. Ex. 4, p. 5.)

Mr. Dreiling went on in his report to indicate that claimant's limited education (and presumably her inability to speak English fluently) would cause claimant to experience significant problems in finding work within her medical restrictions.

The testimony of Dr. Brown disputes Mr. Dreiling's conclusion that claimant's injuries and resulting medical restrictions result in the elimination of the entire medium category of

work. Accordingly, the Appeals Board finds the percentage loss of labor market access opinion given by Mr. Dreiling to be unreliable. Although Mr. Dreiling's opinion on claimant's ability to earn wages post injury were based upon the same flawed assumptions, the Appeals Board finds other support in the record for there being a substantial loss in claimant's ability to earn comparable wages. We find that claimant's post injury wage earning ability has been reduced to $5.00 per hour. Assuming a 40-hour work week, claimant retains the ability to earn $200 per week. When compared to the stipulated average weekly wage claimant was earning at the time of her injury of $369.02, claimant's wage loss is 46 percent.

Mr. Dreiling testified that the medium category of work represents 41 percent of claimant's preinjury labor market and that if the full range of medium work were included in claimant's post injury labor market then she would have a 15 percent loss. Although the Appeals Board considers the restrictions recommended by Dr. Brown and Dr. Prostic to eliminate some portion of the jobs within the medium work category, we cannot say what percentage has been lost due to her injuries. However, we can say that 15 percent represents the minimum percentage claimant has lost.

The Appeals Board finds that claimant has failed to prove her actual percentage loss of ability to assess the open labor market. This prong of the two-part test will, therefore, be treated as 15 percent. Using the formula approved by the Kansas Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), giving equal weight to the claimant's 15 percent loss of ability to perform work in the open labor market and the 46 percent loss of ability to earn comparable wage, results in a work disability of 30.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated February 20, 1996, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Victorina Almarez and against the respondent, Excel Corporation, a qualified self-insured, and the Kansas Workers Compensation Fund for an accidental injury which occurred September 4, 1992 and based upon an average weekly rate of $369.02, for 6.43 weeks of temporary total disability compensation at the rate of $246.03 per week or $1,581.97, followed by 78.71 weeks of permanent partial disability compensation at the rate of $25.83 per week or $2,033.08 for a 10.5% functional disability, followed by 329.86 weeks at the rate of $75.04 per week or $24,752.69 for a 30.5% permanent partial work disability, making a total award of $28,367.74.

As of June 30, 1997, there is due and owing claimant 6.43 weeks of temporary total disability compensation at the rate of $246.03 per week or $1,581.97, followed by 78.71 weeks of permanent partial disability compensation at the rate of $25.83 per week in the sum of $2,033.08, followed by 166.35 weeks of permanent partial disability compensation at the rate of $75.04 per week in the sum of $12,482.90 for a total of $16,097.95 which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of $12,269.79 is to be paid for 163.51 weeks at the rate of $75.04 per week, until fully paid or further order of the Director.

Claimant is awarded future medical treatment upon application to and approval of the Director.

Claimant is awarded unauthorized medical treatment up to $350 upon proper presentation of itemized statements.

All other and remaining findings and orders by the Administrative Law Judge are adopted by the Appeals Board to the extent they are not inconsistent with the findings, conclusions and orders enumerated herein.

IT IS SO ORDERED.

Dated this ____ day of June 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
D. Shane Bangerter, Dodge City, KS
Randall D. Grisell, Garden City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director